

Crossing the Baltic Rubicon

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In a classic work of American constitutionalism, Bruce Ackerman refers to the “constitutional moments” that define the political arrangements enshrined in a Constitution. In Ackerman’s work this development takes place in a paradoxical way, because such “constitutional moments” of US history do not involve an amendment of the written Constitution. They simply happen and then the Constitution changes forever, but not in writing.

EU Law has had its own share of constitutional moments. In a process characterized by integration through law, these moments have traditionally taken place in the terrain of the law and lawyers, mostly through judgments and then implemented through practice. *Van Gend en Loos* was a constitutional moment. The rebellion of constitutional courts against unbridled integration, starting with the German Constitutional Court in the *Maastricht* decision, was another constitutional moment. The *discovery* of EU fundamental rights as general principles of EU law was another “constitutional moment”.

Last week another constitutional moment took place. In a rather technical area of law, the Statute of the European System of Central Banks, the Court of Justice ruled for the first time in a case that ensued in the annulment of a decision of a Member State. The Court did not declare that a Member State had failed to fulfill its obligations under EU Law. What the Court did was much more ambitious, for it annulled an act rendered by an authority of a Member State and extricated it from the domestic legal order. For the very first time, EU Law entered fully into the legal order of a Member State, declared a breach within the domestic legal order and eradicated the national legal act *ipso iure*. There was no need for the Member State to take any appropriate measures. No need for national courts to ensure the fulfilment of the duties enshrined in EU Law. The EU legal order did the job for them.

In the case of *Rimsevics and ECB/Latvia* ([C-202 and 238/18](#)), the Court was called to rule on the grounds of Article 14.2 of the Statute of the European System of Central Banks. This provision is, in the words of a dear colleague, an “extravagant rule”, unparalleled in the Treaties. It contains a remedy that looks like an infringement action, but it walks like an action of annulment. It empowers the governor of a national central bank, or the Governing Council of the ECB, to challenge before the Court of Justice the decision of a national authority to remove the governor from office if the removal has taken place disregarding the conditions established in the Treaties. When Mr. Rimsevics, Governor of the Central Bank of Latvia, was provisionally suspended from office as a result of criminal investigations, Article 14.2 of the Statute was the obvious provision to apply.

Before I continue, just a quick disclaimer: although I represented one of the parties in this case, the following lines are a purely personal account and view of the judgment.

But as the reader will quickly note, it is no provocation to argue that the Court has crossed a Rubicon, a constitutional Rubicon that allows no turning back.

Contrary to the opinion of Advocate General Kokott, who purported that the Court should render a declarative judgment (in line with the requests of the applicants), the final decision was much bolder. After considering the features of Article 14.2 of the Statute, the Court, sitting in Grand Chamber, ruled that the action provided for in Article 14.2 of the Statute “has as its purpose the annulment of the decision taken to relieve a governor of a national central bank from office”.

The Court reviewed the terms and the evidence provided by the Latvian authorities and ruled that Article 14.2 had been breached. Mr. Rimsevics was removed from office without complying with the substantive requirements provided in the Statute. As a result, and here comes the constitutional moment, the Court “*hereby annuls the decision of the Korupcijas novēršanas un apkarošanas birojs (Anti-Corruption Office, Latvia) of 19 February 2018 in so far as it prohibits Mr Ilmārs Rimševičs from performing his duties as Governor of the Central Bank of Latvia*”.

In all its technicality, this rather simple statement hides a revolution with the potential of changing EU law forever. Despite its differences with public international law, EU law has remained faithful to basic principles of international orthodoxy, including the separation of legal orders that precludes international courts from judicially reviewing the legality of State action. The infringement procedure is a good example of how convention has prevailed in Luxembourg, whereby judgments are set to declare that a Member State has failed to comply with its obligations, but no annulment occurs directly in the judgment. The same happens in preliminary references in which national law is indirectly reviewed, where the Court limits its decision to state that EU law must be interpreted in the sense that it is opposed, or not opposed, to a rule of national law. The national court does the rest, including the purge or setting aside of the national act.

In *Rimsevics and ECB/Latvia* the Court has taken an additional step by declaring the breach and, immediately after, annulling the national act that incurred in such a breach. The annulment or repeal of national law is not left to the national authorities, but quite the contrary: it is left to the Court to purge the rule itself, irrespective of the author or position of the authority rendering the rule. If the rule would have been a constitutional provision, the Court would annul. If the rule would have been a judgment of a national court, the Court would annul. The fact that the annulled act was an individual decision of an administrative body does not deprive the judgment of its seismic impact.

One could argue that the case is limited to a very specific provision that allowed the Court to do precisely that: annul a national act. But there is nothing further from the truth: Article 14.2 of the Statute makes no reference to the annulment of a national act, it simply conveys certain features of an action of annulment, but at the same time it also shows significant traits of an infringement action. The decision to annul a national act was not evidently and unconditionally provided in a Treaty provision. It is the interpretation of the Court that has managed to exert such an extraordinary effect, unparalleled in international law and EU law itself.

The rationale underlying the Court's decision is quite straight forward. According to the Court, "the ESCB represents a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, *and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails*" (italics added).

Thus, one could argue that this result is confined to the European System of Central Banks and no more. But think twice. "Novel legal constructs" are constantly in the making in the EU. Just take a glimpse at the recently created European Prosecutor's Office, in which another "novel legal construct" has been put into place to safeguard the financial interests of the EU. If in the future the Court strikes down a national criminal judgment on the grounds that the European Prosecutor's Office is a "novel legal construct" within which "a different structure and a less marked distinction between the EU legal order and national legal orders prevail", the assertion's premiss would be correct. The same applies to the Single Supervisory Mechanism, whereby the ECB implements national law, and national authorities enforce EU law and ECB instructions. Novel legal constructs are not the exclusive domain of monetary policy, and the challenges of European integration are blending EU and national legal orders in unprecedented ways that blur the distinction between both systems.

It would be wrong to argue that *Rimsevics and ECB/Latvia* is an isolated decision. Quite the contrary: by stepping into national law and purging its legal order in a way that is unparalleled in international law, the Court of Justice has finally and fully stepped into the shoes of a national court. In fact, if this judgment is seen together with the Court's efforts to protect the independence and integrity of national judiciaries, the overall effect is one in which a *new* Court has emerged. A Court sitting at a constitutional apex, assisting national courts when their integrity is undermined, confronting Member States that drift away from the rule of law, and annulling national acts when necessary, particularly in areas in which a less marked distinction between the EU legal order and national legal orders prevail.

The final portrait emerging from this description is a genuine constitutional moment, crossing a Rubicon through the northern route, via Latvia.

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